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6 Attorneys for Plaintiffs

7
8 UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
10

11 GIL CROSTHWAITE, RUSS BURNS, in their
12 respective capacities as Trustees of the
OPERATING ENGINEERS HEALTH AND
13 WELFARE TRUST FUND FOR NORTHERN
CALIFORNIA; PENSION TRUST FUND
14 FOR OPERATING ENGINEERS;
PENSIONED OPERATING ENGINEERS
15 HEALTH AND WELFARE FUND;
OPERATING ENGINEERS AND
16 PARTICIPATING EMPLOYERS PRE-
APPRENTICESHIP, APPRENTICE AND
17 JOURNEYMEN AFFIRMATIVE ACTION
TRAINING FUND; OPERATING
18 ENGINEERS VACATION AND HOLIDAY
PLAN; OPERATING ENGINEERS
19 CONTRACT ADMINISTRATION TRUST
FUND; OPERATING ENGINEERS MARKET
20 PRESERVATION TRUST FUND;
OPERATING ENGINEERS INDUSTRY
21 STABILIZATION TRUST FUND; BUSINESS
DEVELOPMENT TRUST FUND; AND
22 HEAVY AND HIGHWAY COMMITTEE,

23 Plaintiffs,

24 v.

25 KICKIN ENTERPRISES, INC., a California
Corporation, and STEVE LAWRENCE
26 SCHALLER, Individually,

27 Defendants.

Case No.: C07-6460 WDB

COMPLAINT

1 Parties

2 1. The Operating Engineers Health and Welfare Trust Fund for Northern California;
3 Pension Trust Fund for Operating Engineers (which includes the Pension Plan for the Pension
4 Trust Fund for Operating Engineers, and the Operating Engineers Annuity Plan); Pensioned
5 Operating Engineers Health and Welfare Fund; Operating Engineers and Participating Employers
6 Pre-Apprenticeship; Apprentice and Journeyman Affirmative Action Training Fund; and
7 Operating Engineers Vacation and Holiday Plan are employee benefit plans as defined in the
8 Employee Retirement Income Security Act of 1974 ("ERISA") § 3(3), 29 U.S.C. § 1002(3). They
9 and their fiduciaries are together referred to herein as "ERISA Plaintiffs." Gil Crosthwaite and Russ
10 Burns are Co-Chairmen of the Joint Boards of Trustees of the ERISA Plaintiffs with authority to
11 act on behalf of all Trustees.
12

13 2. Operating Engineers Local Union No. 3 of the International Union of Operating
14 Engineers, AFL-CIO ("Union") is a labor organization as defined in § 2(5) of the National Labor
15 Relations Act ("NLRA"), 29 U.S.C. § 152(5).
16

17 3. KICKIN ENTERPRISES, INC. and STEVE LAWRENCE SCHALLER,
18 individually, are employers by virtue of ERISA § 3(5), 29 U.S.C. § 1002(5), and NLRA § 2(2), 29
19 U.S.C. § 152(2). They are referred to herein as "Defendants".
20

21 Jurisdiction

22 4. Jurisdiction exists in this Court over the claims asserted by the ERISA Plaintiffs by
23 virtue of ERISA § 502, 29 U.S.C. § 1132, in that the ERISA Plaintiffs seek to enforce the
24 provisions of ERISA and the terms of their plans, seek to enjoin the acts and practices which
25 violate ERISA, seek equitable relief to redress such violations, and seek all other appropriate relief
26 under ERISA.
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Bargaining Agreement

10. The Union and defendants entered into a collective bargaining agreement requiring employer contributions to the Plaintiff Funds, and to the Union for union dues and to other Trust Funds more fully described in the Master Agreement incorporated into the Independent Northern California Construction Agreement to which defendant is signatory, and in the Private Work Agreement to which defendant is signatory. Those Agreements are referred to herein as the "Bargaining Agreements," and the ERISA Plaintiffs and Trust Funds are third party beneficiaries of those Bargaining Agreements.

11. The Operating Engineers Contract Administration Trust Fund, Operating Engineers Market Preservation Fund, Operating Engineers Industry Stabilization Trust Fund, Business Development Trust Fund, and Heavy and Highway Committee, together referred to herein as "Trust Funds," are funds for which plaintiff Boards of Trustees are the assignees of monies due under the Bargaining Agreement.

12. STEVE LAWRENCE SCHALLER is a guarantor for plaintiffs' claim, pursuant to the terms of the Independent Northern California Construction Agreement.

13. Under the terms of said Bargaining Agreement and of the governing documents of the ERISA Plaintiffs which documents are incorporated into the Bargaining Agreement and made binding on defendants, defendants are required to submit monthly reports of hours worked by their employees, and to regularly pay to the Plaintiff ERISA Funds, to the Union for union dues, and to the Trust Funds, certain sums of money, the amounts of which are determined by the hours worked by employees of defendants, all as more fully set forth in said Bargaining Agreements. Also under the terms of said Bargaining Agreements and the governing documents of the Plaintiff Funds, defendants agreed to pay liquidated damages for each delinquent payment, which become part of the contributions. Defendants further agreed to pay interest on the combined contributions

1 and liquidated damages at the rates set by the Bargaining Agreement, from the day immediately
2 following the date that each such payment became due until paid in full, all as more fully set forth
3 in said Bargaining Agreements.

4 In addition, the Bargaining Agreements incorporate plaintiffs' Trust Agreement, which
5 require that defendants permit authorized representatives of the plaintiffs to review defendants'
6 records to determine their compliance with their payment obligations to plaintiff Trust Funds.
7

8 Facts

9 14. Defendants failed to pay all contributions due as reported by them to the plaintiffs
10 under the Bargaining Agreement for work performed during the period June 2007 through
11 November 2007. Liquidated damages and interest have been incurred and are owing on those
12 contributions incurred for this period.

13 15. Demand was made on defendants on behalf of plaintiffs, for payment of all
14 delinquent contributions, liquidated damages and interest due to the ERISA Plaintiff Funds, the
15 Union, and the Trust Funds. Defendant has failed and refused to make payment of all amounts
16 due claimed herein, as required by the Bargaining Agreement.
17

18 16. On several occasions, written demands were made on defendants on behalf of
19 plaintiffs, to schedule an audit and provide records for examination pursuant to the terms of the
20 Collective Bargaining Agreements and the governing documents of the ERISA Plaintiffs, for the
21 period June 1, 2007 through date of audit.
22

23 17. Defendants have refused and continue to refuse to provide records and to permit an
24 authorized representative of the Plaintiffs to examine defendants' records as are necessary to
25 determine whether defendants have made full payment of all sums owed to the plaintiffs for the
26 period June 1, 2007 through date of audit.
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1 18. Defendants have a statutory duty to make the required payments timely to the
2 ERISA Plaintiffs under ERISA § 515, 29 U.S.C. § 1145, and by failing to make such timely
3 payments has violated the law.

4 19. Defendants have a contractual duty under the Bargaining Agreement to timely
5 make the required contributions, liquidated damages and interest to the ERISA Plaintiffs and the
6 Funds, and to timely make the required payment of union dues to the Union. By failing to make
7 such timely payments as required, defendants have breached said duty.

9 20. Defendants' failure and refusal to timely submit the aforesaid payments, and
10 defendants' failure and refusal to provide records and to permit examination of its records, as
11 alleged herein was at all times, and still is, willful. Said refusal is unjustified and done with
12 malicious intent. Defendants' failure to timely make such payments in compliance with the
13 Bargaining Agreement has reduced the corpus of the ERISA Plaintiff funds and operating ability
14 of the Union, thereby impairing their ability to pay or provide benefits to members and
15 beneficiaries, and thereby causing harm to all ERISA Plaintiffs funds and to the Union.
16 Defendants' obligations pursuant to the Bargaining Agreement are continuing obligations;
17 defendants continue to breach said Bargaining Agreement by failing and refusing to timely pay
18 monies due thereunder to the Plaintiff Funds and the Union, and by failing to permit examination
19 of its records as alleged. Plaintiffs are informed and believe, and therefore allege, that defendants
20 will continue to willfully refuse to make said payments unless ordered by this Court to comply.

22 21. Plaintiffs are without an adequate remedy at law and will suffer continuing and
23 irreparable injury, loss and damage unless defendants are ordered specifically to perform all
24 obligations required on defendants' part to be performed under ERISA, 29 U.S.C. §§ 1101-1381,
25 the LMRA, 29 U.S.C. §§ 141-197, the Bargaining Agreement, and the governing documents of
26
27
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1 the Plaintiffs Funds referred to therein, and are restrained from continuing to refuse to perform as
2 required thereunder.

3 22. This Court is authorized to issue injunctive relief based on traditional standard. As
4 set forth above, plaintiffs have a strong likelihood of success on the merits, there is the possibility
5 that the Board of Trustees and the participants will suffer irreparable injuries, and the balance of
6 hardships and advancement of public interest favor plaintiffs.
7

8 Prayer

9 WHEREFORE, Plaintiffs pray as follows:

10 1. For a judgment against defendants as follows:

11 a. For unpaid contributions for hours worked as specified above and thereafter
12 determined through judgment;

13 (1) To the ERISA Plaintiffs, in accordance with ERISA Section
14 502(g)(2)(A), 29 U.S.C. Section 1132(g)(2)(A) and the Bargaining Agreement;

15 (2) To the Union in accordance with the Bargaining Agreement.

16 b. Liquidated damages on late paid and unpaid contributions in an amount
17 provided for under the Bargaining Agreement and governing documents of the Plaintiff Funds and
18 with respect to the ERISA Plaintiffs, ERISA Section 502(g)(2)(c), 29 U.S.C. Section
19 1132(g)(2)(c).
20

21 c. Interest on late paid and unpaid contributions, dues and liquidated damages
22 which become a part thereof, at the rates set in accordance with the Bargaining Agreement, the
23 governing documents of the ERISA Plaintiffs and the ERISA Section 502(g)(2)(B), 29 U.S.C.
24 Section 1132(g)(2)(B).
25

26 2. For an order requiring defendants to provide certain records and to submit to an
27 audit of such records by a date certain for the period June 1, 2007 through date of audit.
28

1 3. For any additional contributions and dues payable to plaintiffs and the Trust Funds
2 as third party beneficiaries of the Bargaining Agreement at time of judgment, plus interest and
3 liquidated damages as above provided and in accordance with the Bargaining Agreement, the
4 governing documents of the Plaintiff Funds, and with respect to the ERISA Plaintiffs, ERISA
5 Section 502(g)(2), 29 U.S.C. Section 1132(g)(2).
6

7 4. ERISA Plaintiffs' reasonable attorneys' fees and costs of this action and for auditors'
8 costs, in accordance with ERISA § 502(g)(2)(D) and (E), 29 U.S.C. § 1132(g)(2)(D) and (E); and
9 in accordance with the collective bargaining agreement for all Bargained Plans, and with LMRA
10 Section 301, 29 U.S.C. § 185 for all plaintiffs.

11 5. For an order,

12 (a) requiring that defendants comply with their obligations to plaintiffs under
13 the terms of the Bargaining Agreement and the governing documents referred to therein;
14

15 (b) enjoining defendants from violating the terms of those documents and of
16 ERISA; and

17 (c) enjoining defendants from disposing of any assets until said terms have
18 been complied with, and from continuation or operating of defendants' business until said terms
19 have been complied with.

20 6. That the Court retain jurisdiction of this case pending compliance with its orders.

21 7. For such other and further relief as the Court may deem just and proper.
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23 Dated: December 21, 2007

SALTZMAN & JOHNSON LAW CORPORATION

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25 By: _____/s/_____
26 Muriel B. Kaplan
27 Attorneys for Plaintiffs
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